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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JIMMY RAY MACK, Defendant and Appellant.	C035531 (Super. Ct. No. 99F06341)

A jury found defendant Jimmy Ray Mack guilty of evading a peace officer while driving with a "willful or wanton disregard" for the safety of persons or property. (Veh. Code, § 2800.2, subd. (a); further section references are to the Vehicle Code unless otherwise specified.) The trial court sentenced him to the low term of 16 months in state prison, doubled to 32 months based on the finding that defendant has a prior serious felony conviction. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12)

On appeal, defendant contends the trial court erred by (1) failing to instruct the jury sua sponte with definitions of all the Vehicle Code violations upon which the prosecution relied, in part, to establish the willful or wanton disregard element of the charged offense, and (2) not instructing sua sponte with CALJIC No. 17.01 to the effect that, in order to find defendant guilty, the jurors had to agree unanimously on which three Vehicle Code violations he committed for purposes of finding a willful or wanton disregard for the safety of persons or property. Finding no prejudicial error, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was driving his car with his headlights off shortly after midnight on July 30, 1999. Sheriff's Deputy Alan Humphrey noticed and initiated a traffic stop. Defendant stopped on Edison near Ball Way and turned on his headlights. However, as Humphrey walked from his patrol car toward defendant's car, defendant sped away with his tires squealing. Humphrey got back into his patrol car and chased defendant.

While evading Deputy Humphrey on Edison, defendant drove entirely on the wrong side of road. He ran the stop sign at the intersection of Edison and Morse as he turned left onto Morse at a high speed, with tires squealing and the car's rear-end sliding. Defendant turned off the headlights just before turning or as he turned onto Morse, apparently in an effort to lose the pursuing officer.

Defendant then turned onto Lerwick, losing some control of his car as he went around the corner and ending the turn on the

wrong side of the road. He sped down Lerwick while straddling the center line, and ran the stop sign without slowing down at the intersection with West Country Club Lane.

Defendant next made a fast turn onto East Country Club Lane, again with the tires squealing and the car's rear-end sliding. When defendant turned into a dead-end alley or driveway between two four-plexes, he hit a parked car and skidded to a stop.

When Deputy Humphrey stopped behind defendant's car, defendant backed it into the patrol car. He then got out and ran toward the four-plex, but was spotted by a sheriff's helicopter and was then apprehended nearby.

Defense witness John Grant testified he purchased defendant's car from a tow yard about 40 days after defendant was arrested. He drove the car for about three weeks before getting rid of it because it needed expensive repairs, which he could not afford. Grant stated the car was a "piece of junk" with dangerously slow acceleration. It took five to seven minutes to reach 40 m.p.h., and one-and-a-half to two miles to reach 50 m.p.h. The car was able to reach only 25 to 35 m.p.h. while merging on to the freeway. Grant also testified the car had defective steering, would veer spontaneously into the oncoming lane, and was not responsive in turns.

Defense witness Christopher Kauderer, an expert in traffic accident reconstruction, measured the total distance of the car chase at slightly under one mile. He calculated the "critical speed" for each turn executed by defendant during the chase. A car turning at faster than the critical speed will experience some loss

of control, as evidenced by tire squeal or sliding of the rear end. According to Kauderer, the critical speeds of the four turns taken by defendant were 36 to 40 m.p.h., 30 to 34 m.p.h., 31 to 35 m.p.h., and 24 to 27 m.p.h., respectively. Those figures assumed that the turns were taken with a wide arc but, if as the officer stated defendant's car made a tighter arc, this would have resulted in a lower critical speed. The gist of Kauderer's testimony was that defendant was not driving as fast as Deputy Humphrey thought he was. Kauderer examined photos of the area where defendant's car stopped in the alley and saw no skid marks.

DISCUSSION

I

At trial, defendant conceded that he was guilty of the lesser included offense of violating section 2800.1, misdemeanor evasion of a peace officer ***without*** willful or wanton disregard, and invited the jury to convict him of that offense instead of the felony of violating section 2800.2. Consequently, only the willful or wanton disregard element of the section 2800.2 offense was an issue.

Consistent with section 2800.2, subdivision (b), the court instructed the jury that willful or wanton disregard "includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time the person driving violates three or more Vehicle Code sections, such as: [¶] Vehicle Code section 22350, basic speed law; [¶] Vehicle Code section 22450, the stop sign requirement; [¶] Vehicle Code section 21650, driving on the right side of the roadway; [¶] Vehicle Code section

24250, having headlamps on at the nighttime; [¶] Vehicle Code section 22107, unsafe turn; or, [¶] Damage to property occurs."

The court further instructed the jury that willful or wanton means "an act or acts intentionally performed with a conscious disregard for the safety of persons or property. It does not necessarily include an intent to injure."

The prosecution argued that either three Vehicle Code violations or defendant's "conscious disregard" established the willful and wanton element of the offense.

During deliberations, the jury asked two questions regarding the Vehicle Code sections listed in the instructions. The first inquired: "Does running 2 stop signs count as 2 violations of the Vehicle Code?" The second asked: "What's the definition of an unsafe turn?" The court responded in writing as follows: "1) The answer to question 1 is 'yes'. [¶] 2) The definition of an unsafe turn is described in Vehicle Code section 22107, which states, 'No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate si[g]nal in the manner provided in this chapter in the event any other vehicle may be affected by the movement.'"

Defendant argues the trial court erred by failing also to define for the jury the *other four* Vehicle Code violations upon which the prosecution was relying, in part, to establish the willful or wanton element of the charged offense. The People concede the error but argue it was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d

705, 710-711] (*Chapman*).) We accept the People's concession of error.

The trial court has a responsibility to give sua sponte the jurors explanatory instructions when a term in an instruction has a "technical meaning that is peculiar to the law." (*People v. Howard* (1988) 44 Cal.3d 375, 408.) This is so because "[i]t is the trial court's duty to see that the jurors are adequately informed on the law governing all elements of the case to the extent necessary to enable them to perform their function." (*People v. Reynolds* (1988) 205 Cal.App.3d 776, 779, disapproved on another ground in *People v. Flood* (1998) 18 Cal.4th 470, 484, 487.)

The provisions of sections 22350, 22450, 21650 and 24250 are matters on which the jurors should have been instructed further; simply giving them cursory descriptions of the subject matter of those statutes was inadequate. (See *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1335-1336, 1338-1339 [error not to define "speeding" alleged in violation of section 22350; jurors need not be licensed drivers and thus not all jurors are necessarily familiar with traffic laws--but error was harmless]; *People v. Minor* (1994) 28 Cal.App.4th 431, 437-438 [error was prejudicial]); *People v. Gary* (1987) 189 Cal.App.3d 1212, 1217 [error harmless], disapproved on another ground in *People v. Flood, supra,* 18 Cal.4th at p. 481; cf. *People v. Prettyman* (1996) 14 Cal.4th 248, 266-267 [duty of court to identify and describe elements of potential target or predicate crimes for "natural and probable consequences" doctrine of aider and abettor liability].)

The *Chapman* standard of review applies to a broad category of errors regarding elements of an offense, including misdescriptions, omissions, or presumptions. (*People v. Flood, supra,* 18 Cal.4th at p. 499; *Neder v. United States* (1999) 527 U.S. 1, 9-10, 13-14 [144 L.Ed.2d 35, 47, 50].) Applying this standard, we agree with the People that the instructional omissions in this case were harmless beyond a reasonable doubt.

Deputy Humphrey testified defendant ran two stop signs, one at the intersection of Edison and Morse and another at Lerwick and West Country Club. Because defendant presented no evidence to the contrary, he effectively conceded committing those two Vehicle Code violations during the car chase. (See *People v. Flood, supra,* 18 Cal.4th at p. 504.)[1] And uncontradicted by any evidence was Deputy Humphrey's testimony that defendant committed a third violation by driving at night without his headlights on.[2]

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[1] "The driver of any vehicle approaching a stop sign at the entrance to, or within, an intersection . . . shall stop at a limit line, if marked, otherwise before entering the crosswalk on the near side of the intersection. [¶] If there is no limit line or crosswalk, the driver shall stop at the entrance to the intersecting roadway . . . ." (§ 22450, subd. (a).)
During summation, the prosecutor argued among other things that defendant ran stop signs. Defense counsel's only response was that maybe defendant stopped but the officer did not notice, an assertion unsupported by any evidence *and* contrary to the officer's testimony that he never lost sight of defendant's car during the pursuit. Further, defense counsel expressly admitted defendant "[b]lew at least a stop sign there if the officer was actually up on him."

[2] "During darkness, a vehicle shall be equipped with *lighted* lighting equipment as required for the vehicle by this chapter." (§ 24250, italics added.)

Rather than contesting the stop sign and headlight violations, the defense focused on arguing that defendant was not speeding, a view supported by Grant's and Kauderer's testimony.

Since the two stop sign and one headlight violations were uncontroverted and were supported by overwhelming evidence, "the jury verdict would have been the same absent the error" and "the erroneous instruction is properly found to be harmless." (*Neder v. United States, supra,* 527 U.S. at pp. 17-18 [144 L.Ed.2d at p. 52].)

II

Defendant also contends the trial court erred by not giving CALJIC No. 17.01, which in its pattern form states: "The defendant is accused of having committed the crime of _____ [in Count ___]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count ___] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count ___], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict." (CALJIC No. 17.01 (6th ed. 1996).)

After the prosecutor argued that defendant drove without headlights, defense counsel did not respond or even make any reference to that assertion. (See *People v. Miller* (1999) 69 Cal.App.4th 190, 209.)

In defendant's view, to the extent the jury based its finding of willful or wanton disregard upon three Vehicle Code violations, all 12 jurors were required to agree as to *which three* Vehicle Code provisions he violated.

People v. Mitchell (1986) 188 Cal.App.3d 216 (*Mitchell*) involved closely analogous circumstances. The appellant in that case was charged with violating section 23153, subdivision (a), driving a vehicle while under the influence of alcohol and/or drugs and, when so driving, doing any act "forbidden by law" or neglecting a duty imposed by law, which act or neglect proximately caused injury to another person. (*Id.* at p. 218.) The alleged acts "forbidden by law" were a violation of the basic speed law (§ 22350) and engaging in a speed contest (§ 23109, subd. (a)). (*Ibid*.) The appellant argued that the trial court erred "in not instructing the jury, sua sponte, it must unanimously agree on the acts forming the offense, violation of either the basic speed law or the speed contest prohibition or both." (*Id.* at p. 219.) *Mitchell* disagreed because "the charges of violating the basic speed law and engaging in a speed contest are merely theories of guilt proposed by the prosecution, as to which the rule is [that] the jurors need not be instructed that to return a verdict of guilty they must all agree on the specific theory--it is sufficient that each juror is convinced beyond a reasonable doubt that the defendant is guilty of the crime charged as it is defined by the statute. [Citations.]" (*Id.* at pp. 221-222.) "The unsafe speed and speed contest elements of the [driving under the influence of alcohol] charge here fall within the category of alternate ways

of proving a necessary element of the same drunk driving charge. It follows under this analysis [that] the instruction was not required." (*Id.* at p. 222.)

Defendant's claim in this case fails for the same reason. The different Vehicle Code violations upon which the prosecution relied in part were merely theories of guilt, alternate ways of proving the willful or wanton disregard element of the same section 2800.2 charge. Hence, to the extent that the prosecutor relied on Vehicle Code violations to prove this element, not all 12 jurors were required to agree that the *same* three of those five statutes were violated by defendant. It was sufficient each juror was convinced beyond a reasonable doubt that defendant violated *any combination of* three of the five possible Vehicle Code violations (or that he acted with "conscious disregard," or that damage to property occurred, the additional theories by which the willful or wanton element could be proven).

Since jury unanimity was required only as to willful or wanton disregard, not the basis for that element, CALJIC No. 17.01 was not required, and the trial court did not err by failing to give it.

Defendant's argument to the contrary relies primarily on *People v. Gary, supra,* 189 Cal.App.3d 1212 (*Gary*), a case that is factually similar to *Mitchell* but reaches the opposite conclusion on the need for the unanimity instruction. *Gary* involved the charge of driving under the influence of alcohol and doing an act "forbidden by law" by driving the wrong way on a one-way street (§ 21657), failing to drive on the roadway (§§ 530, 21650), and speeding (§§ 22348, 22350). (*Gary, supra,* 189 Cal.App.3d at p. 1215.)

Gary held the trial court erred in failing to instruct the jurors that to convict they had to agree unanimously on which act "forbidden by law" defendant committed (though *Gary* found the error harmless). (*Id*. at p. 1218.)

We conclude that *Mitchell* is the better reasoned decision and, thus, reject the holding of *Gary*. In doing so, we note that the *Mitchell* analysis, and our application of it in this case, accords with established law. (See cases cited at *Mitchell, supra,* 188 Cal.App.3d at p. 222; and see *People v. Russo* (2001) 25 Cal.4th 1124, 1132-1135 [where evidence shows only a single discrete crime but leaves room for disagreement on how crime was committed, jury need not unanimously agree on basis or theory of guilt; thus, jury need not agree on same overt act for conspiracy]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1024-1025 [where defendant claims alternative theories of guilt rely on inconsistent facts, jury need not decide unanimously on theory of guilt, such as whether defendant was aider and abettor or direct perpetrator; jury need only agree unanimously on each element of the charged crime; factors establishing aiding and abetting are not elements of crime]; *People v. Prettyman, supra,* 14 Cal.4th at pp. 267-268 [jury need not unanimously agree on which particular target or predicate crime the defendant aided and abetted]; *People v. Pride* (1992) 3 Cal.4th 195, 249-250 [when first degree murder charge is submitted to jury under both premeditation and felony-murder theories, unanimity not required on which of the proposed theories governed the killing]; *People v. Jones* (1986) 180 Cal.App.3d 509, 515-516 [in conspiracy case, jury need not agree on particular

overt act]; 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 647, pp. 929-931.)

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

We concur:

NICHOLSON, J.

CALLAHAN, J.